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No. 95-1861

IN THE

Supreme Court Of The United States

October Term, 1995

DANIEL IMMEDIATO; DIANE IMMEDIATO;
AND EUGENE IMMEDIATO,

Petitioners,

v.

RYE NECK SCHOOL DISTRICT; KATHLEEN D. GULOTTA;
FRANK SPEDAFINO; BEATRICE CERASOLI;
ALAN MANOCHERIAN; JANICE K. ANDERSON; LIZA
PERELSTEIN; PETER J. MUSTICH,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

BRIEF OF THE RUTHERFORD INSTITUTE, AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae is a non-profit civil liberties organization named for Samuel Rutherford, a 17th-century Scottish minister and rector of St. Andrew's University, The Rutherford Institute is comprised of attorneys, judges, physicians, law students, educators and other citizens dedicated to the protection of parental rights, religious liberty, freedom of speech and other constitutional guarantees. Counsel for *Amicus Curiae*

[1] Counsel of record to the parties in the case described above have consented to the filing of the brief and letters of consent have been filed with the Clerk pursuant to Rule 37.

have specialized in litigation in state and federal courts and have participated as counsel in previous significant cases before this Court.

The Rutherford Institute believes that the right of parents to direct and control the moral and educational upbringing of their own children is one of the values most deeply rooted in the law and history of the United States. It is not the function of government to forcibly supplant that role and force all parents to subsume within their family life transient values as defined by government. Any coercive act that attaches a penalty to non-compliance with such a government imposed value diminishes the lives of all citizens and threatens jealously guarded constitutional freedoms. The Rutherford Institute believes that the instant case, addressing as it does these fundamental constitutional liberties, is important to constitutional jurisprudence and the growth and progress of the nation.

Affirming the lower court's decision in the instant case would detrimentally impact the exercise of constitutional freedoms by all citizens. *Amicus Curiae* therefore has a vital interest in seeking reversal of the decision of the lower court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Amicus Curiae adopts by reference the statement of facts as set forth in Petitioners' brief filed with this Court.

SUMMARY OF ARGUMENT

This case is not about the undoubted value of community service, or the benefits for all of compassion in action. This case is about the unconstitutional, unwarranted and excessive intrusion of government into the daily lives and beliefs of individual citizens. It is about the fundamental right of parents

to direct the moral education of their offspring and of those individual offspring to make their own decisions about service to others, a right historically recognized by government and judiciary. It is about the danger to a free society of straying from the beliefs that founded this nation and upon which its greatness has been based.

The denial by the lower courts of such a basic right on the part of parents misinterprets the intent of the Fourteenth Amendment to the United States Constitution and the precedents of this Court. The lower court misapprehended the terminology commonly in use at the time of the decisions upon which the court based its opinion (*See* Petition 9-12). It sets a dangerous precedent for future lower court judges who mistakenly believe it to be their duty to make new law dramatically impacting constitutional freedoms.

The notion that state rights over students' free time and moral education so trump those of the family that all the state has to do in order to reduce parents to meaningless babysitters of the state's property is to suggest one potential application of the mandated program raises the ugly specter of Orwellian tyranny.

This case is about the duty of government, and the limits of the power of that government to regulate individual conduct. We respectfully request that this Court grant the Writ in order to clarify for all the fundamental nature of the Fourteenth Amendment protections afforded all individual citizens under the Constitution.

ARGUMENT

I. IN A DEMOCRATIC NATION FUNDAMENTAL LIBERTIES CANNOT BE DEPENDENT UPON THE VEERING WINDS OF POLITICAL OR SOCIAL THEORY, BUT MUST RESIDE IN THE BEDROCK OF CONSTITUTIONAL INTEGRITY.

Good intentions do not make good law. As Justice Brandeis stated so eloquently:

> Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greater dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 479 (1928).

The desirability of encouraging an appreciation in everyone, young and old, of the value of selflessness is not at issue here. That the vision of the "thousand points of light" is a noble one would be denied by few. However, the essence of that vision is the *willingness* of Americans to join together and serve others. Willingness cannot be mandated. Mandatory volunteerism is, indeed, an oxymoron. It reminds one irresistibly of the Armed Forces approach to volunteerism -- "you, you and you!"

In his *On Liberty* John Stuart Mill wrote:

> A government cannot have too much of the kind of activity which does not impede, but aids and stimulates, individual exertion and development. The mischief begins when instead of calling forth the activity and powers of individuals and bodies, it substitutes its own activity for theirs.

On Liberty, Ch. V (1859). The Rye Neck High School Community Service Program has the dubious honor of exactly illustrating this principle.

Beyond the possible damage that required "good works" may do to the future willingness of young people to commit their time to others in a truly voluntary manner, such social experimentation undermines the very freedoms upon which this country was founded. As Madison wrote:

> [T]he preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the great Barrier which defends the rights of the people. The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants. The People who submit to it are governed by laws made neither by themselves, nor by an authority derived from them, and are slaves.

James Madison, *A Memorial and Remonstrance* (1785) (as reprinted in *Everson v. Board of Education*, 330 U.S. 1, 65 (1947)).

Strong words, but the Founders of our nation were men of strong conviction. In *The Rights of Man*, Thomas Paine wrote:

> Government is no further necessary than to supply the few cases to which society and civilization are not conveniently competent; and instances are not wanting to show that everything which government can usefully add thereto, has been performed by the common consent of society, without government.
>
> * * * * *
>
> But how often is the natural propensity to society disturbed or destroyed by the operations of government! When the latter, instead of being ingrafted on the principles of the former, assumes to exist for itself, and acts by partialities of favor and oppression,

> it becomes the cause of the mischief it ought to prevent.

The Rights of Man, Part II Ch. I (1791-92).

The strength of mind and belief which was exhibited by those who wrote our Constitution did not die with their generation. In modern times, Americans have continued to fight for the rights of man, and sentiments very similar to those expressed by Thomas Paine have been professed by numerous people in all walks of life. In the context of programs which espouse community spirit it has even been said:

> [M]aking considerateness. compassion, kindness, generosity, and other virtues pertaining to civilized community life matters of government mandate . . . is a fundamental threat to the quality of human community life . . .

Tibor Machan, "The Petty Tyranny of Government Regulation," in *Rights and Regulation*, ed. Tibor R. Machan and M. Bruce Johnson (Pacific Institute for Public Policy Research, 1983), 287.

The goal of community service might be laudable, but the forced participation imposed upon students by government is intrusive and unconstitutional. That a "no diploma" penalty attaches to resistance to such coercion makes the means used to justify the end even less palatable. The school thereby assumes a role that is not part of the duty of government, that of the deciding authority in the establishing of a system of values for life.

Parents are primarily responsible for inculcating values in their children. Schools have a *secondary* role, in that they are responsible for assisting the primary caregivers. By denying the right of parents to be the primary caregivers and decision-makers in their children's upbringing government, in this instance, further weakens the family structure and increases the potential of causing the anti-social mischief which it misguidedly seeks to correct.

Nothing in the rulings of this Court in *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) can reasonably be held to stand for the subjugation of parental rights to those of the state where the non-curricular educational conceits of the time are concerned. The confusion of the meaning of the term "reasonable" as applied to the 1920's cases with the terminology employed in establishing modern review jurisprudence in 1938 has produced bad, and perhaps unintended, law. The Second Circuit expressed a desire to exercise "judicial self-restraint" in breaking "new ground" (Petition, App. A-13), but then went on to misinterpret the standard of review in *Meyer* and *Pierce*, and to discard the support for parental rights so frequently affirmed by this Court.

In *Farrington v. Tokushige*, 273 U.S. 284 (1927), this Court upheld the fundamental nature of parental rights in an educational case not involving care and custody issues. Then, two decades after the *Meyer* case (and six years after *United States v. Carolene Products*, 304 U.S. 144 (1938)), this Court once again spoke for the parents of America:

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.

Prince v. Massachusetts, 321 U.S. 158, 166 (1944). In *Ginsberg v. New York*, 390 U.S. 629, 639 (1968), this Court again stressed the importance of the primary role of parents in the nurturing of their children.

In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court struck down a law requiring attendance at school up to the age of 16. The Court reiterated that there is a "*fundamental* interest of parents, as contrasted with that of the State, to guide the religious future and education of their children." *Id.* at 232

(emphasis added). Interference from the state into the life values training of children by parents is not constitutional.

The statements of this Court regarding the fundamental nature of parental rights cannot be regarded as mere sentiment. The opinions in *Prince* and *Ginsberg* were an affirmation of the underpinnings of the American Constitution and the fundamental nature of family rights which are "deeply rooted in the Nation's history and tradition." (*Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).)

The right of families to guide and direct their internal relationships is a "fundamental liberty interest protected by the Fourteenth Amendment," as this Court held in *Santosky v Kramer*, 455 U.S. 745, 753 (1982). *Santosky* followed a venerable line of cases, including *Meyer* and *Pierce*, in which the family was recognized as a right of first importance by this Court.

One of the most eloquent statements of the dangers inherent in permitting rulings such as that in the instant case to stand is contained in the decision of the court *in Valent v. New Jersey State Board of Education*, 274 A.2d 832 (N.J.Super.Ch.Div. 1971):

> Is the State, through the educational system, permitted to encroach upon the patterns and molding of a child's behavior in personal, family or religious beliefs? Parental discipline, authority and respect diminish as the great sovereign state forces its way into the home as a foster parent. Some parents may be happy to be relieved of the obligation and responsibility. Others may feel that the constant eroding of their usefulness as parents portends great danger, and youth will look to the state, rather than the parent, for guidance.

Id. at 839.

"The vigilant protection of Constitutional freedoms is nowhere more vital than in the community of American

schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Thus, when a conflict arises between the rights of individuals and the actions of school administrators, this Court has consistently made its position clear. As the Court said in *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969): "In our system, state-operated schools may not be enclaves of totalitarianism." *Id.* at 511.

In the instant case the lower court, in subordinating the rights of parents to the rights of a paternalistic state, opens a Pandora's box of threats to the family. This is no chimera. In the past year alone, this Court has been asked to review many cases brought by concerned parents, including one involving a challenge by parents to condom distribution in public schools (*Curtis v. School Committee of Falmouth*, 652 N.E.2d 580 (1995), *cert. denied*, 116 S.Ct. 753 (1996)); issues of parental consent to explicit sexual presentations in public schools (*Brown, et al. v. Hot, Sexy and Safer Productions Inc., et al.*, 68 F.3d 525 (1995), *cert. denied* 3/4/96); the overriding by school officials of parental instructions against counseling (*Newkirk v. Fink* (Unreported Case No. 94-1520 6th Cir.; *cert. denied* 10/25/95). *Amicus* has represented numerous parents whose rights to direct the upbringing of their children in respect of education, values training and discipline have been under threat of usurpation by government actors. Even as the instant case is under consideration, *Amicus* is representing the family of a sixth grader who was allegedly subjected to a genital examination at school without proper consent being obtained from either the student or her parents (*Doe v. East Stroudsburg Area School District, et al.*, Case No. CV-96-852 filed on 5/10/96 in the United States District Court for the Middle District of Pennsylvania).

In those cases where this Court ruled in favor of the school officials, there was always at least a potential for excusal from the challenged program. But what opportunity for opting out is there in the instant case? None. If the student does not do his charitable service in full public view (contrary

to the tenets of many religious faiths), and in the form prescribed by the government, he will be denied his high school diploma. Is the message we wish to send our young people today that charity begins at the Capitol, that only government endorsed charity is to be appreciated and rewarded, and that lack of such appreciation carries with it serious consequences? Surely not.

The above-referenced cases are but a very few instances of actions instituted by concerned parents around the country, and do not even include examples of intrusion into the family by state actors other than schools. Further, we see but the tip of the iceberg when we consider only lawsuits filed. The vast majority of protests and concerns never reach a court of law.

The threat to the family is real, and we earnestly request that this Court provide to the vast majority of parents in this country, who increasingly feel themselves to be under siege at the hands of Big Brother, the support that is their due. The failings of a few cannot be used as justification for stripping the many of their constitutional right to make decisions for their own children. As E.L,. Doctorow said in *The Nation*: "The relentless logic of a Constitution in the name of the people is that a national state exists for *their* sake, not the other way around." *Id.* February 21, 1987 (emphasis added).

II. GOVERNMENT ADMINISTERED PROGRAMS WHICH QUALIFY PARTICIPANTS FOR RECEIPT OF BENEFITS BY RELIGIOUS INQUIRY EXCESSIVELY ENTANGLE THE STATE IN MAKING JUDGMENTS REGARDING THE RELATIVE VALUE OF RELIGIOUS ACTIVITY AND ARE UNCONSTITUTIONAL.

A further danger of the unnecessary intrusion of government into purely private actions is that posed by the involvement of state actors in deciding which organizations qualify as "worthy" of inclusion. Schools, by imposing limits on the

types of organizations or groups which are included within the program, make value judgments which they pass on to the children.

In the instant case, there is a very real danger of school officials becoming excessively entangled with religion by their investigation into the extent of "proselytization" involved in working with any religiously-affiliated organization. Organizations that are excluded from the program because of "separation of church and state" issues but which, for any number of reasons, may have been the organization of choice of a particular student, are therefore portrayed as somehow less worthy than other organizations with differing political or social complexions.

Thus the government, in requiring "voluntary" work and setting qualifying rules for its implementation, is establishing a hierarchy of worthiness. It imposes a penalty on those who do not agree with that hierarchy by denying a diploma to anyone who fails to comply, and undermines the rights of families to make their own moral and value decisions. That a court would place on a higher rung of the constitutional ladder the right of government to indoctrinate the young of the nation in certain values to the exclusion of others which are of at least equal value, and would devalue the right of parents to be the primary guiding force of their children's beliefs and values, is a perversion of the Constitution and the freedoms of which we, as a nation, are so proud.

Thomas Jefferson, in proposing his 1779 statute for religious freedom, stated the following:

> 7) that even forcing [a man] to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness;

> 8) and is withdrawing from the ministry those temporary rewards which, proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labors for the instruction of mankind;
>
> * * * * *
>
> 13) that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own . . .

The Papers of Thomas Jefferson, vol. 2, edited by Julian P. Boyd (Princeton, 1950), pp. 550-51.

It is unnecessary in this brief to discuss at length the history of the three-prong test for government endorsement of religion as enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Suffice it to say that this Court has consistently held that an essential requirement of the Constitution and of American jurisprudence is that schools may not endorse or disapprove of any religion, either explicitly or implicitly (*Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring). Such perception of endorsement or disapproval is unavoidable in the Rye Neck program.

In *Tinker*, this Court limited the power of the state to inculcate its own particular set of values in students:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are pos-

> sessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.

393 U.S. at 511. Even in *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989 (3d Cir.), *cert denied*, 114 S.Ct. 85 (1993), a case where a community service program which utilized many non-discriminatory options for students including the possibility of a student-designed service program, the court rejected the argument that once an educational purpose has been found to exist a community service program is automatically constitutional. *Id.* at 994.

The perceived value to students of an out-of-hours program is not a sufficient justification for the unconstitutional intrusion of the state into family life and decisions, nor is it a sufficient state interest for the unconstitutional evaluation of religious activity for purposes of assessing the value to the community of any particular service program. We therefore respectfully request that this Court grant the Petition for Certiorari and reverse the decision of the lower court.

CONCLUSION

> A constitution is the property of a nation, and not of those who exercise the government.

Thomas Paine, *The Rights of Man*, Part II Ch. IV. *Amicus Curiae* respectfully requests that this Court return to the parent Petitioners the "property" rights they have held for more than 200 years, and which are now under direct and serious threat.

Protection of the fundamental freedoms of the people of the United States requires that the decision of the court below must be reversed.

Respectfully submitted,

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